

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

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**UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 400, CLC, Respondent,**

**and**

**Case No. 06-CB-222829**

**SHELBY KROCKER, Charging Party.**

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**CHARGING PARTY’S REPLY TO UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 400’s ANSWERING BRIEF**

In its Answering Brief, United Food and Commercial Workers Union Local 400’s (“Union”) largely fails to address Charging Party Shelby Krocker (“Krocker” or “Charging Party”) and the General Counsel’s arguments and instead does little more than regurgitate its prior arguments without additional analysis.<sup>1</sup> Thus, much of the Union’s arguments have already been addressed by Charging Party’s Brief in Support of Exceptions. The Union also erroneously claims that the General Counsel failed to properly raise certain allegations before the ALJ. Charging Party will discuss each of the Union’s arguments, to the extent necessary, in turn.<sup>2</sup>

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<sup>1</sup>References to the Joint Motion to Submit Stipulated Facts and Exhibits to the Administrative Law Judge will be cited as “Stipulation,” the exhibits attached to the Stipulation will be cited as “Ex.,” and Administrative Law Judge (“ALJ”) Robert A. Giannasi’s Decision and Order will be cited as “ALJD.” Additionally, Charging Party’s Brief in Support of Exceptions will be cited as “Krocker Br.,” the General Counsel’s Brief in Support of Exceptions will be cited as “Gen. Counsel Br.,” and the Union’s Answering Brief to the Exceptions of the General Counsel and Charging Party will be cited as “Union Br.”

<sup>2</sup> The Union purposefully misidentifies Charging Party’s retained counsel as the “Right to Work Committee,” and falsely claims Ms. Krocker was assisted by that entity. Union Br. at 6, 14, 15. The Union is well-aware the “Right to Work Committee” plays no role in this litigation and that the undersigned counsel are staff attorneys at the National Right to Work Legal Defense Foundation, Inc. This knowledge is evidenced by the Union’s correct identification in its certificate of service, Union Br. at 19, and because Krocker has already specifically notified the Union of this fact in her previous reply brief before the ALJ, see Krocker ALJ Reply at 12 n.6, in response to similar unprofessional statements, see Union ALJ Br. at 11 n.2, 13. The Board should consider

## ARGUMENT

### **I. This case is not moot and the Union cites no Board authority to suggest otherwise.**

In the face of overwhelming evidence and case law to the contrary, the Union baldly asserts this case is moot. Union Br. at 7, 9. In its brief, the Union failed to refute—or even acknowledge—Charging Party’s or the General Counsel’s arguments, Krockner Br. 21–25; Gen. Counsel Br. 3–4, and overstates the ALJ’s conclusion on this issue.

“A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (citation and quotation marks omitted). “[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* at 307–08 (citing *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)). As discussed in detail in Krockner’s brief, the case is not moot because: (1) the Union has not made Krockner financially whole; (2) Krockner is entitled to a notice posting and other affirmative remedies on behalf of her fellow employees; (3) the Union may continue enforcing its illegal checkoffs against other employees; and (4) the Union has not met the National Labor Relations Board’s (“Board”) standard for repudiation and remediation set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Krockner Br. at 21–25. The Union ignored each and every one of these arguments in its Brief, effectively conceding that the case is not moot. However, even setting aside its abject failure to address Charging Party’s exceptions and brief, the Union’s arguments in support of mootness are meritless.

First, the Union argues it resolved the case by belatedly honoring Charging Party’s checkoff and refunding the dues it accepted from her wages. Union Br. at 7. However, the Union ignores

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admonishing the Union’s counsel to conduct themselves professionally, as it has done in other similar cases. *See, e.g., UFCW Local 951*, Case No.16-CB-003850 (Order dated July 24, 2020).

the inconvenient fact that its payment to Krocker represented only the total amount deducted from her wages, without interest. Stipulation at ¶ 17(c). Charging Party is entitled to relief in the form of an interest payment. Krocker Br. at 21; *Teamsters Local 385*, 366 NLRB No. 96, slip op. at 3 (June 20, 2018) (requiring interest payments despite the union already refunding the amounts deducted). Additionally, as discussed in detail in her brief, Charging Party is entitled to other remedies, including a notice posting. Krocker Br. at 21–22.

Second, the Union appears to congratulate itself on belatedly “releasing” Krocker from her checkoff and refunding the dues unlawfully deducted. Union Br. at 7.<sup>3</sup> In doing so, the Union ignores the fact that it unlawfully *rejected* her checkoff revocation, and its continued collection of dues pursuant to a revoked checkoff violated the National Labor Relations Act (“Act”). Krocker Br. at 22–23. The Union did not do anything it was not required to do by law—in fact, its delay in honoring Charging Party’s revocation was its own violation of Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A). *See* Krocker Br. at 23.

Third, the Union argues its removal of certain unlawful language from and its formatting changes to its checkoff form, moot the applicable exceptions. Union Br. at 8–9. However, the Union makes no assertion that it rescinded or voided *all* existing checkoffs with the unlawful language. Thus, as Krocker argued in her Brief, she had standing to seek a remedial order to cease enforcement of the unlawful checkoff language on behalf of similarly situated employees who signed the original checkoff. Krocker Br. at 22; *see, e.g., Rochester Mfg. Co.*, 323 NLRB 260, 263 (1997) (ordering class-wide retroactive remedies in a case where the union failed to provide new

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<sup>3</sup> The quote from the ALJD the Union cites for the proposition that it “more than cured” its rejection of Krocker’s checkoff revocation is entirely irrelevant. Union Br. at 7. The quote specifically applies only to the allegation regarding “notification of the specific dates in the window period,” which is distinct from the discussion here. ALJD at 10 n.8.

hires with proper *Beck* notice); *Newspaper & Mail Deliverers' Union (NYP Holdings, Inc.)*, 361 NLRB 245, 256 (2014) (same).

Finally, none of the actions the Union claims “more than cured” its violations satisfy the *Passavant* standard. 237 NLRB at 138–39; Krockers Br. at 23–24. For all of these reasons, and the reasons discussed in her Brief, Charging Party’s claims are not moot.

## **II. The Union had a duty to provide Charging Party with her specific window period dates.**

The Union summarily states that it did not violate Section 8(b)(1)(A) or its duty of fair representation by failing to provide Charging Party with her window period dates, repeating the ALJ’s erroneous statement that “no case law is cited in support of this affirmative duty.” Union Br. at 8. The Union again ignores Krockers’ Brief, which *does* cite case law for the proposition that the Union failed in its fiduciary duty of fair representation to provide Charging Party with her window period dates in response to her specific request. Krockers Br. 18–19. The Union ignores these cases because it has no answer for them. As discussed in Charging Party’s brief, the Union violated the Act by failing to provide her *specific* window period dates. *Id.*

## **III. It is illegal for a checkoff to include the phrase “MUST BE SIGNED.”**

The Union’s checkoff contains twin demands that it “MUST BE SIGNED” on either side of the title of its checkoff. Ex. 3. As discussed in great detail in Krockers’ Brief, this demand is unlawfully coercive. Krockers Br. at 3–9. The Union musters a weak defense of these demands. Its sole substantive defense is: the phrase was not “*meant* as coercive but instead serves to reinforce the requirements of Section 302 . . . and state law requirements regarding paycheck deductions.” Union Br. 9 (emphasis added).

As discussed in Charging Party’s brief, what the Union “meant” is irrelevant to whether its conduct violates the Act. Krockers Br. at 4–5. Rather, the question is: “whether the words could

reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Constr. Grp., Inc.*, 339 NLRB 303, 303 (2003). Any reasonable employee would understand the twin “MUST BE SIGNED” commands as an employment requirement that the checkoff be signed, and the Union never attempts to explain otherwise. *See* Ex. 3. The Board has that held similar verbal and written communications violate the Act. *See, e.g., Int’l Union of Elec. Workers, Local 601 (Westinghouse Elec. Corp.)*, 180 NLRB 1062 (1970).

The Union’s claim that the “MUST BE SIGNED” language was inserted to reinforce compliance with West Virginia law and Labor Management Relations Act Section 302(c)(4), 29 U.S.C. § 186(c)(4), rings hollow.<sup>4</sup> The Union provides no case law or statutory text to support the contention that use of the phrase “MUST BE SIGNED,” is even contemplated by those statutes. While Section 302(c)(4) requires an authorization for dues deduction to be in writing, that is not the issue presented here.<sup>5</sup> The issue presented here is whether it is coercive to *require* or *demand* that an authorization must be signed as a condition of employment or Union membership.

The Union’s claim that the “MUST BE SIGNED” language is “not mere surplusage” is undermined by its hasty removal of that language in response to this litigation. Union Br. at 9; Ex. 6. If indeed this language was not “mere surplusage,” surely the Union would still need it to “reinforce” the written requirement of Section 302(c)(4). *Id.* The fact the Union does not use this language in its revised checkoff forms supports Krockner’s and the General Counsel’s conclusion that the language was unlawful and served only to coerce employees in the exercise of their Section

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<sup>4</sup> The Union fails to acknowledge Krockner’s argument that the Union cannot rely on West Virginia law in this instance because it is preempted by Section 302(c)(4). Krockner Br 5–6.

<sup>5</sup> The Union claims that Section 302(c)(4) requires a written authorization to be signed (as opposed to some other writing), but cites to no case to support its contention.

7 rights, 29 U.S.C. § 157, in violation of Section 8(b)(1)(A). Krockner Br. at 3–9; Gen. Counsel Br. at 12–14.

**IV. The format and language of the Union’s checkoff are unlawfully coercive.**

As discussed in Charging Party’s Brief, the format of the Union’s checkoff is unlawfully coercive. Krockner Br. at 9–11. The Union’s substantive response to Charging Party’s and the General Counsel’s arguments is that Charging Party only signed two of the three parts of the form “demonstrating that she was not confused by the format and understood that each authorization was separate and voluntary.” Union Br. at 10. Far from demonstrating Charging Party’s signatures were “separate and voluntary,” her signatures reinforce the coercive nature of the language and format of the form. The first part of the form, the “Membership Application,” contains similar “Must Be Signed” language to the second portion of the form (the checkoff). Ex. 3. The third part of the form “UFCW Local 400-ABC Payroll Deduction Authorization Form” does not contain such mandatory language. *Id.* Krockner only signed the Membership Application and checkoff—the two parts of the form that contained the coercive, mandatory language. *Id.* Thus, contrary to the Union’s claim, Krockner’s two signatures support Charging Party’s and the General Counsel’s arguments that the form itself is coercive. Krockner Br. at 9–11; Gen. Counsel Br. at 13–14.

Similarly, the language in the Union’s checkoff is so confusing that it amounts to coercion. Krockner Br. at 10–11. The Union, again parroting the ALJ’s faulty analysis, limits its rebuttal to addressing the single phrase “whichever occurs sooner,” thereby ignoring the General Counsel’s and Charging Party’s actual allegations, which deal with much more than those three words. Thus, for the reasons outlined in Charging Party’s Brief, the ALJ’s conclusion and the Union’s argument here are incorrect. Krockner Br. at 10–11; Gen. Counsel Br. at 20–23.

In a related argument, the Union claims the Board has no jurisdiction over Section 302(c)(4) and basing its argument on the Sixth Circuit’s holding in *Ohlendorf v. UFCW, Local 876*, 883 F.3d 636 (6th Cir. 2018). Union Br. 14–15 n.2.<sup>6</sup> But, *Ohlendorf* actually supports the Board’s jurisdiction in this case. There, the Sixth Circuit held Section 302 did not provide a private right of action for individuals challenging a checkoff in *federal court*. The court noted the proper way for an employee to challenge a checkoff is to file “a complaint with the National Labor Relations Board on the ground that a violation of § 302, or a similar statute amounts to an unfair labor practice under the National Labor Relations Act. Many employees . . . have taken this last route.” *Id.* at 643 (citations omitted). Thus, *Ohlendorf* provides no support to the Union’s specious arguments.

**V. The portability clause in the Union’s checkoff violates the Act.**

The Union argues that checkoff transferability is a settled issue. For this proposition it cites a distinguishable Ninth Circuit case, *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1276 (9th Cir. 1983), and a General Counsel advice memorandum. Union Br. at 10–11. The Union makes no attempt to refute Charging Party’s in-depth discussion of *Associated Builders*, in which Charging Party points out the significant differences between that case and the facts here. Krocker Br. at 17–18. Instead, the Union merely stated the Ninth Circuit in that case interpreted the provision in the form at issue as a “‘reasonable adaptation’ of the requirements of Section 302(c)(4),” ignoring the material differences between that form and its checkoff. Union Br. at 10 (quoting *Associated Builders*, 700 F.2d at 1276).

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<sup>6</sup> The Union also wrongly claims “there is no allegation that anybody forced the charging party here to sign an authorization card. There are certainly no allegations here that the Union engaged in misrepresentation, fraud or dishonesty.” Union Br. at 14–15 n.2. These statements are patently false. The allegation in this case is the Union coerced Krocker into signing her checkoff precisely because its checkoff *misrepresented* to Krocker that it “MUST BE SIGNED.”

The Union does not dispute that under its theory of the case, any unrevoked checkoff is transferrable to any employer in perpetuity. Rather, the Union simply argues that it would be impractical not to have such clauses. Union Br. at 9–10. The Union also baldly states “there is nothing that either excepting party has identified which would make a transferred authorization problematic.” Union Br. at 11. This statement ignores Charging Party’s entire argument, which describes the portability clause’s significant infringement on employee rights. Krocker Br. at 15–16. As explained in Krocker’s Brief, an employee cannot knowingly or willingly agree to contract with any and *unknown* future employer(s). *Id.* The Board cannot countenance the Union’s overbroad and egregious portability language that undercuts employees’ Section 7 right to refrain.

Under the Union’s construction, an employee could quit her job at Kroger, be hired by an entirely different grocery store twenty-years later, and if that new grocery store had a CBA with the Union, the employee’s checkoff could automatically resume and she would still be bound to its onerous terms. According to the Union this is a feature, not a bug, because it would be “impractical” to require the Union to procure a new checkoff agreement from the employee.

The Union’s portability clause and its “common sense” arguments in support thereof are contrary to the Act’s purpose: employee free choice and voluntary union support. As properly noted by the Supreme Court: “The complete freedom of individual choice in this area . . . may seem unfortunate to labor organizations, but it is a problem with which we think Congress intended them to live.” *Felter v. S. Pac. Co.*, 359 U.S. 326 (1959); *see also Local 58, IBEW (Paramount Indus., Inc.)*, 365 NLRB No. 30 (Feb. 10, 2017), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018).

**VI. The General Counsel did not fail to raise certain arguments before the ALJ.**

**A. The ALJ did not dismiss the General Counsel's duty of fair representation allegations for failure to raise them.**

The Union claims that the General Counsel never properly asserted a duty of fair representation violation. Union Br. at 15. In fact, the General Counsel did assert these arguments as he discusses in his reply brief. Gen. Counsel Reply Br. 5–6. Moreover, the ALJ did not make a specific finding that the General Counsel failed to raise these arguments. Instead, while the ALJ made certain comments about *how* the General Counsel raised the duty of fair representation allegations, he ultimately engaged in an analysis of these allegations and rejected them on the merits, rather than because they were improperly raised. ALJD at 4–6, 9–10. If the Union believed the General Counsel failed to adequately raise his duty of fair representation claims and the ALJ erred in addressing them on the merits, the Union should have filed cross-exceptions challenging the ALJD on this point. The Union waived this argument by failing to file timely cross-exceptions.<sup>7</sup>

**B. The General Counsel properly challenged *Frito-Lay*.**

Finally, the Union wrongly claims that the General Counsel has not challenged the Board's holding in *Frito-Lay, Inc.*, 243 NLRB 137 (1979). Union Br. 17–18.<sup>8</sup> Contrary to the Union's contention, the General Counsel consistently asserted this allegation. In the Complaint, the General Counsel alleged the Union's checkoff “[d]oes not contain clear language informing signers when they may revoke their dues check-off authorizations or *permitting revocation of the dues deduction*

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<sup>7</sup> The Union again incorrectly states that the record is devoid of any misrepresentations or omissions. Charging Party addresses this statement, *supra*, n. 6. *See also* Krock Br. at 3–9.

<sup>8</sup> In *Frito-Lay*, the Board held that checkoff language creating restrictive window periods can limit an employees' statutory right to revoke her checkoff to a short window occurring before contract expiration. As explained in Krock's opening brief, this is a misreading of Section 302(c)(4), which requires checkoffs to be revocable “beyond” the termination date of a collective bargaining agreement. Krock Br. 13–15.

*authorization upon expiration of a current collective-bargaining agreement with the Employer or during any period in which no collective-bargaining agreement is in effect.” See Ex. 1(g) at ¶ 9(c) (emphasis added).* The General Counsel similarly discussed this allegation before the ALJ, stating: “any dues check-off authorization that restricts the statutory right of employees to revoke their authorization at the expiration of a current contract or during a period in which no contract is [in] effect is improper and unlawful.” Gen. Counsel Br. to ALJ at 16–17. Finally, the General Counsel excepted to the ALJ’s reliance on *Frito-Lay* and argued in support of this exception in his brief. See Gen. Counsel Exceptions at ¶11; Gen. Counsel Br. at 30–32.

The Union alternatively claims that this issue was improperly raised because it did not enforce this restriction against Charging Party. However, enforcement is immaterial because the General Counsel properly challenged the facial validity of the checkoff. Therefore, the Union’s claims that certain allegations were not alleged or are improperly before the Board fail.

## **CONCLUSION**

For the foregoing reasons and those outlined in Krock’s Brief in Support of Exceptions, the ALJ’s Decision should be reversed in its entirety. The Board should find that the Union violated Section 8(b)(1)(A) and provide Krock and similarly situated employees all of the remedies to which they are entitled under the Act.

Date: September 15, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, a true and correct copy of Charging Party's Reply to United Food and Commercial Workers Union, Local 400's Answering Brief was filed electronically with the Executive Secretary using NLRB e-filing system, and copies were sent to the following parties via e-mail:

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